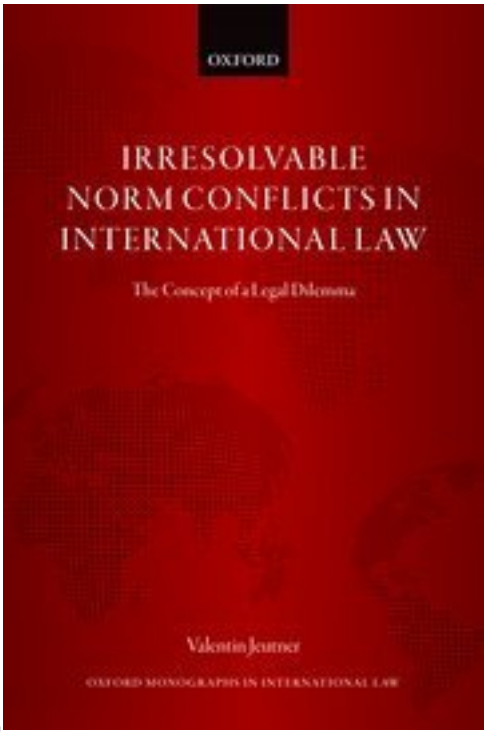
Dilemmatic Discomfort: Author’s Response

Valentin Jeutner 2019-07-08T08:00:05

I am very grateful to Rostam Neuwirth, Surabhi



Ranganathan, Wolfgang Thierse and Lea Wisken for taking the time to engage with my book in such a thoughtful and constructive manner. I would also like to thank the Völkerrechtsblog, and in particular, Sebastian Spitra, for arranging this symposium and Valentina Kleinsasser for translating the interview with Wolfgang Thierse.

The four contributions raise many more points and questions than I have space to address. Thus, in this concluding part of the symposium I can regrettably only engage with a few selected observations. Before I do so, it might be useful to address a certain uneasiness with the concept of a dilemma that appears to inform, in one way or another, all contributions to this symposium. Lea Wisken writes that the acknowledgement of dilemmas could have ‘harsh’ consequences. Surabhi Ranganathan expresses ‘some discomfort’ with the romanticisation of the concept of a dilemma. Rostam Neuwirth links the experience of dilemmatic norm conflicts to a deficient understanding of the world. Wolfgang Thierse expresses gratitude that most decisions are not of dilemmatic character and speaks of the agony that decisions of that kind entail. Even Tim Heath, the actor playing the Prime Minister in the short film Aporia, was initially very reluctant to embrace the film’s dilemmatic decision-making process.

I share this hesitation and uneasiness. The argument in favour of the concept of a dilemma is not the kind of enthusiastic battle-cry with which Gandalf may have led Erkenbrand's swordsmen into the fight against the Orcs at Helm's Deep. The argument in favour of recognising dilemmas is rather (or is meant to be), a more pensive, and possibly slightly resigned, acknowledgement that in light of all the other alternatives, legal dilemmas are the best, though certainly sub-optimal, mechanism of dealing with norm conflicts that international law's otherwise existing norm conflict resolution devises cannot deal with. As Surabhi Ranganathan points out, I do put forward a normative argument in favour of the acknowledgement of the possibility of legal dilemmas. But the normative justifications underlying that argument are very much tied to the characteristics of the contemporary international legal order. In other words, I am not sure that there is something inherently good about legal dilemmas, just as I am not sure that a human existence without the need to make difficult decisions would necessarily be desirable. I am also less certain than Rostam Neuwirth that, as humans and technology advance, legal dilemmas will occur initially more and eventually less frequently. The normativity of my argument is not informed by an aspiration to move towards a new legal order or to return to an old one. Like the considerations that inform the decision-making process sketched by Wolfgang Thierse, my argument is (for the most part) not meant to be an exercise of blue-sky thinking, but merely aims at making the present legal order work within the parameters that the present order aspires to satisfy.

With this last observation in mind, I turn now to Lea Wisken's concern that few actors might be willing to volunteer for the coast guard, or, by extension, to assume positions of responsibility if such positions entail the risk of encountering dilemmas that cannot be escaped by lawful means. Having to rely on the mercy of other actors in circumstances where no lawful course of conduct was available is, according to Wisken, 'harsh'. I agree. And yet I do not think that this 'harshness' is a sufficiently good reason to call the concept of a legal dilemma into question for at least two reasons. The first reason relates to the disclaimer above concerning the argument's normative aspirations. Since the argument is conditioned by the current state of the international legal order, the argument absolutely and explicitly allows for legal norms to be modified in such a manner that legal dilemmas disappear. In fact, the 'harshness', the 'unfairness' of legal dilemmas can act as an incentive for states and lawmakers to adjust the legal order so that it becomes less harsh and more fair. For example, if states want to change the norms governing the use of nuclear weapons they can absolutely do so. If obligations of result, for example in the context of the SOLAS Convention, were to be replaced by obligations of conduct or by obligations of due diligence, many potentially dilemmatic situations could be avoided. So, while I acknowledge the potentially harsh consequences of legal dilemmas, I believe that steps to remedy this harshness should be taken at the legislative / law-making level and not in the court room. This argument is strictly limited to dilemmatic norm-conflicts and does not deny the otherwise important function of judicial law-making and judicial development of law.

One might of course object that a modification of conflicting norms is not always possible or that it is at least beyond the competence of a particular actor confronting a dilemma. This is correct. However, and this is the second reason why concerns

of ‘unfairness’ and ‘harshness’ do not undermine the concept of a legal dilemma, a certain ‘harshness’ is inevitable in human and legal life. Wolfgang Thierse said, slightly uncompromisingly, ‘those who do not tolerate the heat should stay out of the kitchen’. By extension one might say that those who are afraid of the inevitable harshness of taking decisions should not take decisions. At least in the sphere of public international law (and this argument admittedly works much less well in a domestic or private law context) few actors are forced into positions of responsibility. It is thus not unreasonable to argue that decision-makers should accept the unpleasant consequences that any decision-making process at times entails.

Lea Wisken’s second observation concerning the structural bias of legal dilemmas in favour of permissive norms connects to Surabhi Ranganathan’s suspicion that the book might be more informed by consequentialist arguments than it is willing to admit. Lea Wisken remarks that political leaders might be incentivised to opt for exercising rights rather than permissions since the negative consequences attached to the exercise of a right might be less severe than the consequences attached to the compliance with a prescriptive norm. Surabhi Ranganathan suggests that my preference for political actors to decide dilemmas might be based on consequentialist considerations. My response to Lea Wisken’s concern would be that my argument, probably like most mainstream legal arguments, does indeed blank-out consequentialist arguments. Whether the compliance with a prescriptive norm is more or less desirable than exercising a right is, from a legal point of view, difficult to assess. What matters is whether or not a specific course of conduct is allowed / prescribed. I think I can insist on the relative disregard for consequentialist concerns in my response to Lea Wisken without risking inconsistency with respect to my argument in favour of the sovereign decision of dilemmas in response to Surabhi Ranganathan’s comment.

Ranganathan is of course absolutely correct when she points out that the book’s argument does not entirely shy away from advancing consequentialist arguments. Political decisions of dilemmas, the book argues, lead to better outcomes, the judicial decision of dilemmas can have detrimental knock-on effects on the integrity of and respect for international law. However, the main argument in favour of the position that judges should not decide dilemmas is based on a black-letter analysis of contemporary international law: the decision of a legal dilemma under circumstances where international law’s norm conflict resolution and accommodation devices have been unable to identify a priority or comprise between conflicting norms would be an explicit act of judicial norm-making which is, by default, impermissible. I have encountered judges that have said it is their job to ensure that legal dilemmas do not arise. I believe that the opinion of these judges is incompatible with the wording, and the object and purpose of the statutes of most, if not all, international courts and tribunals. Naturally, one can have an extended debate concerning the possibility of any norm conflict surviving rigorous harmonious interpretation exercises, norm conflict resolution principles etc. But if one accepts the possibility of a legal dilemma and if one assumes that explicit law-making exceeds the judicial function of international judges, then, based on international law, irresolvable norm conflicts must be decided not by judges but by political actors. In a world where sovereign behaviour leaves much to be desired an argument ‘carrying a strong whiff

of concession to state sovereignty' (Ranganathan) must of course be used with caution.

Thus, I agree with a second observation by Surabhi Ranganathan relating to the suitability of dilemmatic arguments in all contexts. As pointed out in connection with the interview with Wolfgang Thierse, most decisions decision-makers confront are probably not of dilemmatic nature. Likewise, I would be hesitant to refer to conflicts between 'slow-burning ecological realities and concrete political economies' as dilemmas. A legal dilemma, in accordance with the definition offered in the book, exists only where an actor confronts an irresolvable and unavoidable conflict between at least two legal norms so that obeying or applying one norm necessarily entails the undue impairment of the other. Most of the tensions between environmental and economic norms referred to by Surabhi Ranganathan do not satisfy this definition. Often, the soft-law environmental norms cannot yet compete with the norms of well-established economic regimes, or states simply choose to disregard existing environmental obligations. So quite apart from the fact that I fully agree with Ranganathan that it matters 'how we choose to describe situations', describing the conflicts between ecological necessities and economic desiderata as a legal dilemma is – at least based on the book – not even an option.

Surabhi Ranganathan's observation is a reminder of the potential risks associated with invoking the language of dilemmas too liberally. This risk exists in particular with respect to concepts like paradoxes or oxymora which Rostam Neuwirth discusses. The occurrence of a legal dilemma can coincide with the occurrence of an oxymoron but it does not necessarily do so. On the one hand there is, for example, nothing oxymoronic about a conflict of norms belonging to two different treaties or legal regimes. On the other hand, when two provisions of the same treaty are contradictory or when a contradictory judicial decision would be issued, it could be justifiable to speak of oxymora. In general, many of the oxymora Neuwirth mentions are likely to form part of the normative background that could facilitate the emergence of legal dilemmas. Indeed, some dilemmas may result from inherent, structural tensions within international law, such as the constant oscillation between the need to apologetically reflect State behaviour and to simultaneously prescribe normative conduct 'without being able to establish itself permanently in either position' (Koskenniemi, FATU, 65). I suspect some of these inherent tensions and paradoxes are an integral part of the human existence and I am not sure that adjusting our 'mode of reasoning' in light of current developments will necessarily help us deal with dilemmas better. But it is certainly the case, as Rostam Neuwirth points out, that novel technologies, in particular, challenge orthodox ways of categorising conduct and concepts. And if this challenge is not negotiated carefully, if sovereigns do not 'adapt the laws to the changing realities' (Neuwirth), dilemmas could certainly arise whenever the legal matrix is ill-equipped to account for changing social realities.

Eventually, it is lawmakers who are tasked with adapting laws to changing realities and who must decide if and how certain dilemmas should be decided. The book argues that, compared to judicial actors, politicians are best placed to take decisions of this kind. Apart from the legal reasons mentioned to above, the book also refers

to the different kind of proximity that exists between a political decision-maker and those affected by a political decision-maker's decision and between judicial actors and those affected by judicial actors' decisions. In the interview, Wolfgang Thierse, for example, speaks of the public echo of a decision which 'rains down upon' the decision-maker from all directions. This proximity does not compare to the explicit lack of proximity between judicial actors and the persons who are affected by a judicial decision. Thierse's remarks also appeared to be informed by the conviction that political decision-makers are individually responsible, accountable for the decisions they take. 'The law does not decide anything', he said, it merely guides the decision-making process. Ultimately, it is the human subject that, after agonising moments of doubt, takes a decision knowing that decisions in dilemmatic situations entail an element of arbitrariness. When faced with novel situations, a politician can legitimately sail the waters beyond law's horizon, can rely on instinct, can 'jump', as Thierse said, and can, afterwards, try to undo, to modify decisions when it turns out that they did not have the intended effects. Most importantly, perhaps, Thierse acknowledges that any decision entails an element of guilt, of responsibility. It is impossible to satisfy everyone's interests and it is also impossible to know, in the moment of decision, if the decision was absolutely right or wrong. For good reasons, one would not describe judicial decision-making processes in similar terms. And yet, it might be argued that I am overstating the benefits of political decision-making processes in dilemmatic circumstances. It is important in this regard to remember that I am making this argument explicitly and exclusively with respect to situations where it is impossible to establish a priority or a compromise between two conflicting legal norms. Only with respect to such situations do I argue that relatively more accountable politicians are better placed to decide how to deal with conflicts of this kind.

In the course of writing the book and in the course of this exchange on the Völkerrechtsblog judicial actors were often referred to but their own voice was hardly ever heard. While I did attempt to interview international judges in preparation for this symposium, it turned out to be significantly more difficult to get in contact with judges. Compared to politicians, they have no public e-mail addresses or phone numbers. Those judges that I did manage to speak to were understandably hesitant to reflect publicly about the way in which they (would) issue judgments on some of international law's most controversial legal questions. There are generally very good reasons for not displaying the contact information for judges in public and there are good reasons for judges not to talk extra-judicially at length with a junior academic (or indeed anyone!) about what goes on in judicial deliberation rooms. But it is for exactly those reasons that I think judges are not best-placed to decide dilemmatic norm conflicts. They are legal professionals who are responsible for pronouncing upon the state of law and to decide disputes based on law. Deciding irresolvable norm conflicts is too heavy a burden to carry for them and for the international legal order.

At the beginning of this post I acknowledged a certain discomfort with the concept of a legal dilemma. While this discomfort has been a faithful companion for a few years now, the persistent cognitive dissonance triggered by dilemmatic thinking is more than offset by the numerous, pleasant, enriching, sometimes helpfully confusing,

conversations and encounters that I have had since the first days of engaging with dilemmas. This book symposium was one of those encounters. I enjoyed it greatly and I would like to thank, once again, Rostam Neuwirth, Surabhi Ranganathan, Wolfgang Thierse, Lea Wisken, Sebastian Spitra and Valentina Kleinsasser for making this discussion happen.

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Cite as: Valentin Jeutner, “Dilemmatic Discomfort: Author’s Response”, *Völkerrechtsblog*, 8 July 2019.
